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Future Interests--Posthumous Child--Child en ventre sa mere Regarded as in Being

lease of property not redeemed within two years. The effect of the statute of limitation was thus to extinguish the lien represented by the certificate of sale. The court in its opinion discussed the contention of counsel that the statute "destroys the security upon which the purchaser relied when he advanced his money, namely, the lien of the record after sale",[8] and held that the legislation did not impair the obligation of the plaintiff's contract.

No basis for distinguishing the West Virginia case from *Wheeler v. Jackson* is apparent. In each case a lien existed the enforcement of which was not subject to any statutory limitation prior to the enactment of the statute whose constitutionality was questioned. In each case the questioned legislation had the effect of extinguishing the lien after the expiration of a certain period of time. In each case the holder of the lien had reasonable opportunity to enforce the lien after the effective date of the statute of limitation. In neither case was it necessary to resort to court action to enforce the lien; in the one, only a sale by the trustee under the trust deed was required; in the other, a conveyance executed by the tax collector would suffice. Indeed, all the facts which are material to the problem of constitutionality seem to be virtually identical in the two cases.

Accordingly, the West Virginia decision might well have been for the plaintiff instead of for the defendant, if the case of *Wheeler v. Jackson* had come to the court's attention.

FUTURE INTERESTS — POSTHUMOUS CHILD — CHILD *en ventre sa mère* REGARDED AS IN BEING. — A testatrix by will placed certain property in trust for her children for a period of twenty-one years after her death, but if any child should die within the period "leaving any issue him or her surviving", then in trust for such child absolutely, provided that if the child should die without issue his share should go to the other children. A child died within the period leaving his widow enciente with a child later born alive. *Held,* that he died without "leaving any issue him surviving" on the ground that a child *en ventre sa mère* would only be considered as surviving when it was to receive a direct benefit under the will. *Elliot v. Joicey.*[1]

[8] *Id.* at 256.

[1] (1935) A. C. 209.

This case squarely presents the question of how far the courts will go in holding a child *en ventre sa mère* as in being for the purpose of determining property interests. It has been held both in America and England that a child *en ventre sa mère* comes within the meanings of the words "living", "born", and "surviving" where it is for the child's direct benefit.[2] But this construction of the instrument has been discarded when it would be disadvantageous to the child.[3] An analogous group of cases are those in which there is a gift to a class wherein it is held that the closing of the class is postponed to include the child *en ventre sa mère* if it be to his benefit to do so.[4] The probable basis for these decisions is that this fictional construction most nearly coincides with the wishes of the testator had he foreseen such a situation arising.[5]

However for the purpose of the application of the rule against perpetuities, the child *en ventre sa mère* is regarded as in being whether it is to his advantage or detriment.[6] This exception, it would seem, by prolonging the testator's plan helps to further the actual intention of the testator as do the foregoing cases.

In the principal case the court refused to consider the child *en ventre sa mère* as "surviving" when it would have indirectly benefitted the child by the enrichment of the father's estate. This is the first case in England to draw this distinction between an indirect and direct benefit,[7] illustrating the reluctance of the English courts to carry this fictional construction of a will further than the case of the direct benefit. The American courts have been more liberal, holding such an indirect benefit as sufficient reason to treat

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2 Randolph v. Randolph, 40 N. J. Eq. 73 (1885); *In re* Gebhardt's Will, 139 Misc. 775, 249 N. Y. S. 286 (1936); *In re* Farmer's Loan & Trust Co., 82 Misc. 330, 143 N. Y. S. 700 (1913); Hewitt v. Green, 77 N. J. Eq. 345, 77 Atl. 25 (1910); Dexter v. Attorney General, 224 Mass. 215, 112 N. E. 946 (1916); Hall v. Hancock, 32 Mass. 255, 26 Am. Dec. 598 (1834); Barker v. Pearce, 30 Pa. 173, 72 Am. Dec. 691 (1858); *In re* Salaman, 2 Ch. 46 (1907); Doe d. Clarke v. Clarke, 2 H. Bl. 399 (1795).

3 M'Knight v. Read, 1 Whart. 213 (Pa. 1836); Armistead v. Dangerfield, 3 Munf. 20 (Va. 1812); Villar v. Gilbey, (1907) A. C. 139.

4 Cowles v. Cowles, 56 Conn. 240, 13 Atl. 414 (1888); Lamar v. Crosby, 162 Ky. 320, 172 S. W. 693 (1915); Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925); *In re* McEwan's Will, 234 N. Y. 557, 138 N. E. 445 (1922); Swift v. Duffield, 5 S. & R. 38 (Pa. 1818); Smart v. King, 19 Tenn. 149, 33 Am. Dec. 137 (1838).

5 Comment (1935) 33 MICH. L. REV. 414.

6 GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) § 220; *In re* Wilmer's Trusts, 1 Ch. 874 (1903).

7 Note (1935) 13 CAN. B. REV. 594.

the child *en ventre* as in being,[8] and in fact, mere absence of disadvantage being enough in one case.[9]

It seems that this posthumous child was within "the reason and motive of the gift"[10] which was clearly intended to provide for grandchildren, therefore it is submitted that the distinction drawn by the court is unreasonable on the facts of the case, and inconsistent with the probable intention of the testator to provide directly or indirectly for her grandchildren.

INSURANCE — CONSTRUCTION OF EXCEPTIONS — STORAGE IN PUBLIC GARAGE HELD WITHIN THEFT COVERAGE. — In a recent West Virginia case a recovery was sought under an automobile theft insurance policy which excluded a recovery if the car was voluntarily placed by the owner in the possession of another. *Held,* that a delivery of the automobile to a public garage for the purpose of storage is not such a delivery of possession as will preclude a recovery when the car is stolen by an employee of the garage. *Gibson v. St. Paul Fire and Marine Insurance Campany.*[1]

This decision, placing West Virginia in accord with the majority of cases in other jurisdictions, expressly overrules the earlier West Virginia case of *Shelton v. Insurance Company.*[2] In the latter case a delivery of a car to another to be washed and returned was held such a voluntary relinquishment of possession as would preclude a recovery. The principal case distinguishes the *Shelton* case however, on the ground that statements made therein concerning delivery of possession was dictum and unnecessary to the verdict.

The principal case, in accordance with the weight of authority, differentiates between delivery of possession and delivery of custody.[3] Most courts hold that delivery of possession within the

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[8] Groce v. Rittenberry, 14 Ga. 232 (1853); Bedon v. Bedon, 2 Bailey 231 (S. C. 1831).
[9] Kimbro v. Harper, 113 Okla. 46, 238 Pac. 840 (1925).
[10] See Trower v. Butts, 1 Sim. & Stu. 181, 185 (Ch. 1823).

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[1] 184 S. E. 562 (W. Va. 1936).
[2] Shelton v. National Fire Ins. Co., 115 W. Va. 268, 174 S. E. 887 (1934).
[3] Emerson v. State, 33 Tex. Cr. 89, 25 S. W. 289 (1894); Tripp v. United States Fire Ins. Co. of N. Y., 141 Kans. 897, 44 P. (2d) 236 (1935); Allen v. Berkshire Mutual Fire Ins. Co., 105 Vt. 471, 168 Atl. 682 (1933); Miller v. Newark Fire Ins. Co., 12 La. App. 315, 125 So. 150 (1929); Security Ins. Co. v. Sellers-Sammons-Signor Motor Co., 235 S. W. 617 (Tex. Civ. App. 1921).